INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	3
Argument	7
Conclusion	15

CITATIONS

Cases:

Agnello v. *United States*, 269 U. S. 20	11, 14
Borum v. *United States*, 56 F. (2d) 301, certiorari denied, *sub nom. Logan* v. *United States*, 285 U. S. 555	8
Carnahan v. *United States*, 35 F. (2d) 96, certiorari denied, 281 U. S. 723	9
Clune v. *United States*, 159 U. S. 590	9
Connally v. *Medalie*, 58 F. (2d) 629	11
Coon v. *United States*, 36 F. (2d) 164	11
Delaney v. *United States*, 263 U. S. 586	8
Dulek v. *United States*, 16 F. (2d) 275	14
Friscia v. *United States*, 63 F. (2d) 977, certiorari denied, 289 U. S. 762	11
Galatas v. *United States*, 80 F. (2d) 15, certiorari denied, 297 U. S. 711	10
Glasser v. *United States*, Nos. 30–32, this Term, decided January 19, 1942	9
Goldman v. *United States*, Nos. 962, 963, 980, October Term, 1940, decided April 27, 1942	8
Goldstein v. *United States*, No. 256, this Term, decided April 27, 1942	12
Haywood v. *United States*, 268 Fed. 795, certiorari denied, 256 U. S. 689	8
Hester v. *United States*, 265 U. S. 57	13
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229	11
Koth v. *United States*, 16 F. (2d) 59	13, 14
Lincoln v. *Claflin*, 7 Wall. 132	11
McBride v. *United States*, 284 Fed. 416, certiorari denied, 261 U. S. 614	14
McDonald v. *United States*, 89 F. (2d) 128	9
Meyers v. *United States*, 94 F. (2d) 433, certiorari denied, 304 U. S. 583	10

Cases—Continued. Page

Miller v. *United States*, 24 F. (2d) 353, certiorari denied, 276 U. S. 638 ---- 9

Parks v. *United States*, 76 F. (2d) 709, certiorari denied, 296 U. S. 573 ---- 14

Pong Ying v. *United States*, 66 F. (2d) 67 ---- 14

Quercia v. *United States*, 70 F. (2d) 997, reversed on other grounds, 289 U. S. 466 ---- 11

Raine v. *United States*, 299 Fed. 407, certiorari denied, 266 U. S. 611 ---- 13

Rocchia v. *United States*, 78 F. (2d) 966 ---- 14

Schefano v. *United States*, 84 F. (2d) 513 ---- 9

Schnorenberg v. *United States*, 23 F. (2d) 38 ---- 14

Schulte v. *United States*, 11 F. (2d) 105 ---- 13

Spivey v. *United States*, 109 F. (2d) 181, certiorari denied, 310 U. S. 631 ---- 8

Stark v. *United States*, 44 F. (2d) 946 ---- 14

Taylor v. *United States*, 19 F. (2d) 813 ---- 8

Taylor v. *United States*, 286 U. S. 1 ---- 13

United States v. *Cohen*, 124 F. (2d) 164, certiorari denied, *sub nom. Bernstein* v. *United States*, No. 870, this Term, March 2, 1942 ---- 11

United States v. *Easterday*, 57 F. (2d) 165, certiorari denied, 286 U. S. 564 ---- 8

United States v. *Feldman*, 104 F. (2d) 255, certiorari denied, 308 U. S. 579 ---- 13, 14

United States v. *General Motors Corporation*, 121 F. (2d) 376, certiorari denied, 314 U. S. 618 ---- 8–9

United States v. *Pecoraro*, 115 F. (2d) 245, certiorari denied, 312 U. S. 685 ---- 9

United States v. *Phillips*, 34 F. (2d) 495 ---- 13

United States v. *White*, 29 F. (2d) 294 ---- 14

United States v. *Woods*, 66 F. (2d) 262 ---- 9

Van Dam v. *United States*, 23 F. (2d) 235 ---- 9

Whitecombe v. *United States*, 90 F. (2d) 290, certiorari denied, 302 U. S. 759 ---- 11

Wida v. *United States*, 52 F. (2d) 424 ---- 14

Zarate v. *United States*, 41 F. (2d) 598, certiorari denied, 282 U. S. 867 ---- 9, 11

Statutes:

Criminal Code, Sec. 37 (18 U. S. C. 88) ---- 3

Internal Revenue Code, Secs. 2803(a), 2810, 2833, 2834 (26 U. S. C. 2803(a), 2810, 2833, 2834) ---- 3

Judicial Code, Sec. 269 (28 U. S. C. 391) ---- 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1152

HARRY LEAFORD MILLER AND SAMUEL EUGENE CROSBY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1168

JAKE DEES AND FRANK DEES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 94–98) is reported in 126 F. (2d) 771.

JURISDICTION

The judgment of the circuit court of appeals was entered February 20, 1942 (R. 98). On March

24, 1942, the circuit court of appeals denied (R. 110) the petitions for rehearing filed by petitioners Miller and Crosby (R. 99–106) and by petitioner Jake Dees (R. 107–109). The record does not show that a petition for rehearing was filed by Frank Dees. The petition for a writ of certiorari on behalf of Miller and Crosby (No. 1152) was filed on April 16, 1942, and on behalf of Jake and Frank Dees (No. 1168) on April 23, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934. Since the petition in No. 1168 was filed more than 30 days, exclusive of Sundays and holidays, after the entry of judgment of the circuit court of appeals, we think it was not filed in time insofar as Frank Dees is concerned.

QUESTIONS PRESENTED

Petitioners Miller and Crosby present the following questions:

1. Whether the denial of petitioners' request to inspect the report from which a Government witness refreshed his memory as to a truck license number constitutes reversible error.

2. Whether the trial court improperly admitted testimony of the statements of an alleged co-conspirator who was not on trial.

3. Whether there is substantial evidence to support the judgments of conviction.

The petition of Jake and Frank Dees raises the single question:

4. Whether evidence obtained as the result of a search of petitioner Jake Dees' barn should have been suppressed and its admission excluded because the search was illegal.

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of Florida under two indictments, one of which charged, in six counts, violations of Sections 2803 (a), 2810, 2833, and 2834 of the Internal Revenue Code (26 U. S. C. 2803 (a), 2810, 2833, 2834) relating to the possession, manufacture, and concealment of alcohol and failure to register a still; the other indictment charged a conspiracy to commit the foregoing offenses in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 1–9). The indictments were consolidated for trial (R. 13–14) and petitioners were found guilty on all counts. Petitioners were sentenced on the conspiracy count to eighteen months' imprisonment. A consecutive general sentence of three years' imprisonment which was suspended, with probation to begin at the expiration of the prior sentence, was imposed on the substantive counts (R. 21–33). Upon appeal the judgments of conviction were affirmed (R. 98).

The Government's case may be summarized as follows:

On March 7, 1941, a stake-bodied Ford truck, bearing a Georgia license tag and similar to one reported to investigators of the Alcohol Tax Unit as hauling large quantities of sugar, was disabled by a flat tire and a broken spring on the highway near Bostwick, Florida (R. 53, 63). The truck, loaded with 100-pound bags of sugar covered with bags of charcoal, attracted the attention of two Government investigators who were driving by (R. 53, 63). While the investigators were examining the truck, defendant Cantrell[1] emerged from the woods adjoining the highway and told the investigators that "men had gone to get another truck"; that he was "not from Georgia"; and that "he caught a ride going south" with the "other fellows" who "were from up around Jacksonville" (R. 53, 63).

The investigators withdrew from the scene, and shortly thereafter petitioner Miller appeared in a 1941 model Ford pick-up truck (R. 53–54, 63, 66). A large stake-bodied truck drove up to the disabled truck, and petitioner Crosby, who had arrived in a Buick sedan, helped others transfer the load of sugar and charcoal to this truck (R. 54, 64, 67). When the truck was loaded and covered with a tarpaulin (R. 55), it proceeded south toward Palatka, Florida, followed by petitioners Miller and Crosby in the Buick. On the highway south

[1] Cantrell became ill at the trial, and a mistrial and severance were granted as to him (R. 14–15).

of Palatka, the truck stopped at a pasture gate but the Buick continued down the road (R. 55, 61). Shortly thereafter the Buick was turned around and driven back toward Palatka. The direction of the Buick was soon reversed, and it headed south "at a fast speed." Crosby was driving and Miller "ducked down and sat real low" so that one "could only see the top of his head". (R. 56, 61, 64.) The officers pursued the Buick. When they finally caught and arrested petitioner Crosby for reckless driving, he gave in turn two fictitious names (R. 64–65, 67).

In the meantime, other officers followed the dual wheel tracks of the loaded truck from the pasture gate to a farm a half mile away (R. 56, 61). Here Investigator Anderson "could smell cooking mash." Continuing to follow the dual wheel tracks, the investigator passed through two fence gates, the second of which was from twenty-five to thirty feet from the barn. "He could see the truck tracks go in the front door of the barn. The barn door was shut. He could smell cooking mash and hear men talking." The barn was encircled by a high chicken wire fence. Anderson "stepped over the field fence wire and followed the chicken wire fence" until he came to a window opening into the barn. Looking through the window, he saw a large copper still in operation and some one operating it. He proceeded to the front of the barn, passed

through an unlocked gate in the chicken wire fence and into the barn where he arrested petitioners Jake and Frank Dees and defendant Lee Cantrell (R. 56–57). In the barn was a large unregistered copper distillery with whiskey running from the coil. The fire pot had just been pulled from the still. There were also 108 barrels, 96 of them full of mash, as well as 145 gallons of unstamped "moonshine" whiskey (R. 57–58, 61–62). Besides the 50 sacks of sugar and 29 bags of charcoal still loaded on the truck which the officers had trailed from Palatka, there were additional amounts of sugar and charcoal and 32 sacks of rye (R. 57, 62).

The disabled truck from which the load had been removed was located the next day in the garage at 811 West Church Street, Jacksonville, where petitioner Miller had leased parking space (R. 57–58). The blown-out tire from the disabled truck was found in Miller's 1941 pick-up truck which had been left in the woods the previous day. Sprinklings of sugar, rye, and charcoal were observed on the floor of the pick-up truck, as well as 3 additional license plates hidden under the floor mat. (R. 62, 65.) These plates were identified in connection with the purchase of large quantities of sugar which had been carried away by trucks bearing the same numbers (R. 65, 70–72).[2]

[2] The wholesalers who sold sugar to petitioners kept reports of their sales which contained the name and automobile

ARGUMENT

1. An investigator for the Alcohol Tax Unit, while testifying about an earlier inquiry he had conducted into suspicious sales of sugar to petitioner Miller, referred to a report to refresh his memory (1) as to the correct address of the garage into which Miller had driven his truck loaded with sugar and (2) as to the numbers on the license tags which had been substituted on that truck (R. 89, 91).

Miller and Crosby admit that it was "harmless" error to deny inspection of the report insofar as the garage address is concerned (R. 101) but contend that they were prejudiced by the denial of their request to examine the report with respect to the license number (Pet. 5–9).[3] However, except for the bald assertion that "the evidence as to trucks permeated the entire case" (Pet. 8), petitioners do not undertake to show that they were deprived of any substantial rights by the court's

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license number of each purchaser and the quantity of sugar sold. One wholesaler alone sold petitioner Jake Dees, under the name of Leon Lebrosky, 29,500 pounds of sugar and 3,600 pounds of rye during the three-week period from February 9 to 25, 1941; and the record also reveals that 12,000 pounds of sugar and 2,800 pounds of rye were sold at various times to persons who drove trucks bearing license numbers corresponding to those found on Miller's truck (R. 70–72. Cf. R. 73).

[3] The license number in question, "2GH2582," was not shown to have been on any of the trucks to which the wholesalers had delivered sugar and rye, nor was it identified with any of the trucks involved on March 7.

460944—42—2

refusal to permit inspection of the report. Accordingly, as the court below held (R. 98) "the error was harmless and without prejudice to the defendants" (cf. *Goldman* v. *United States,* Nos. 962, 963, 980, October Term, 1940, decided April 27, 1942; *United States* v. *Easterday,* 57 F. (2d) 165, 167 (C. C. A. 2), certiorari denied, 286 U. S. 564; *Taylor* v. *United States,* 19 F. (2d) 813, 818–820 (C. C. A. 8)) and, in the light of the entire record, is too insubstantial to warrant reversal. Section 269 of the Judicial Code (28 U. S. C. 391); *Spivey* v. *United States,* 109 F. (2d) 181, 185 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Borum* v. *United States,* 56 F. (2d) 301, 303–304 (App. D. C.), certiorari denied, *sub nom. Logan* v. *United States,* 285 U. S. 555; *Haywood* v. *United States,* 268 Fed. 795, 798 (C. C. A. 7), certiorari denied, 256 U. S. 689.

2. Petitioners Miller and Crosby maintain (Pet. 10) that the trial court improperly overruled an objection to testimony of statements of Cantrell, a co-conspirator whose case was severed, to the Government investigators who stopped to examine the disabled truck on March 7, 1941 (R. 53, 63; see *supra,* p. 4). The statements, chiefly in the nature of a self-serving profession of innocence, were, as the court below held (R. 98), "relevant as to what was then going on" in furtherance of the conspiracy and hence admissible. *Delaney* v. *United States,* 263 U. S. 586, 590; *United States*

v. *General Motors Corporation,* 121 F. (2d) 376, 408 (C. C. A. 7), certiorari denied, 314 U. S. 618; *United States* v. *Pecoraro,* 115 F. (2d) 245, 246 (C. C. A. 2), certiorari denied, 312 U. S. 685.[4] In any event since the statements did not incriminate any of the petitioners, their admission even if erroneous would not warrant reversal. Section 269 of the Judicial Code (28 U. S. C. 391); and see cases cited *supra,* p. 8.

3. It is finally contended by petitioners Miller and Crosby that the evidence fails to support the conviction because it "was wholly circumstantial" and not inconsistent with their innocence (Pet. 11–12). But on appeal "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* Nos. 30–32, this Term, decided January 19, 1942. The record discloses that thousands of pounds of sugar and rye were sold to persons who carried them away in trucks bearing license plates afterwards

[4] See also *Clune* v. *United States,* 159 U. S. 590, 593; *McDonald* v. *United States,* 89 F. (2d) 128, 135 (C. C. A. 5); *Schefano* v. *United States,* 84 F. (2d) 513, 515 (C. C. A. 5); *United States* v. *Woods,* 66 F. (2d) 262, 265 (C. C. A. 2); *Zarate* v. *United States,* 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867; *Carnahan* v. *United States,* 35 F. (2d) 96, 103 (C. C. A. 8), certiorari denied, 281 U. S. 723; *Miller* v. *United States,* 24 F. (2d) 353, 362 (C. C. A. 2), certiorari denied, 276 U. S. 638; cf. *Van Dam* v. *United States,* 23 F. (2d) 235, 238 (C. C. A. 6).

discovered in Miller's pick-up truck (R. 62, 65, 71–72). Miller had obviously come to the rescue of the disabled truck found on the roadside loaded with 100-pound bags of sugar. The blown-out tire from the disabled truck was in his pick-up truck which he had left in the woods, as well as a "sprinkling of rye, sugar and charcoal on the floor of the truck" (R. 65); and the disabled truck was located in his garage space the next day (R. 57–58). Crosby actually transferred the sugar to the truck which carried it to the still-house (R. 54, 65, 67). Both escorted the sugar for approximately 25 miles until the truck turned off the main road to Jake Dees' farm, and they fled "at a fast speed" when the officers were in pursuit (R. 53, 56, 66). We therefore submit that the jury was fully justified in finding petitioners guilty on all counts, for where a conspiracy is established, slight evidence connecting the defendant therewith may still be substantial and, if so, sufficient to sustain a conviction. *Meyers* v. *United States,* 94 F. (2d) 433 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Galatas* v. *United States,* 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711.[5]

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[5] Likewise, with respect to the indictment charging substantive offenses, it is well established that if a conspiracy is shown, as in the present case, the acts and declarations of one defendant, outside the presence of his co-defendants, but in the course of the conspiracy, are admissible against the latter, even though a conspiracy is not charged in the indict-

4. Petitioners Jake and Frank Dees specify error (Pet. 4) upon the failure of the trial court to suppress and exclude evidence obtained by the officers who entered the barn and arrested them on March 7, on the ground that they had illegally entered the curtilage of Jake Dees' farm.

Apart from the untimeliness of his petition (see p. 2, *supra*), Frank Dees clearly has no standing to raise this issue. The opinion below states that "in the argument before this court it was conceded by counsel that the record is without error as to him" (R. 97) and, at any rate, since he was merely "visiting" (Pet. 3) the premises, he may not complain of the admission of evidence uncovered by the allegedly unlawful search. *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Connally* v. *Medalie*, 58 F. (2d) 629, 630 (C. C. A. 2); *Coon* v. *United States*, 36 F. (2d) 164 (C. C. A. 10); cf. *Agnello* v. *United States*, 269 U. S. 20, 34; and see

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ment. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249; *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *United States* v. *Cohen*, 124 F. (2d) 164, 166 (C. C. A. 2), certiorari denied, *sub nom. Bernstein* v. *United States*, No. 870, this Term, March 2, 1942; *Quercia* v. *United States*, 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States*, 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 289 U. S. 762; *Zarate* v. *United States*, 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867.

Goldstein v. *United States,* No. 256, this Term, decided April 27, 1942.[6]

Petitioner Jake Dees seems to contend that, apart from the odor of cooking mash, Investigator Anderson had no probable cause to search the barn until after he had entered the "curtilage," i. e., after he had "stepped over a field fence and proceeded to the back of the barn, at which point he saw a still and heard men talking" (Pet. 4). The record is not clear as to the extent of the curtilage. There is nothing to identify the "mule lot" or "mule lot gate" referred to by petitioner (Pet. 4) and while reference is made to apparently six different fences (R. 56, 57, 59), we are unable to tell whether any of them surrounded the house, or the house and the barn. But it is apparent from the record that *before* the investigator "stepped over the field fence", when he was still "twenty-five or thirty feet from the barn", he saw "the truck tracks go in the front door of the barn" and "could smell cooking mash and hear men talking" (R. 56). Furthermore, the record reveals that the barn was completely encircled by a high chicken wire fence, thus isolating it from the rest of the farm, and that the investigator looked through the window and saw the still in operation before he

[6] Motions to suppress (R. 11, 12) were made by Jake Dees alone, and the record does not indicate that any evidence seized by the officers was introduced at the trial or that any objection was made to the testimony of the officers.

crossed the chicken wire fence (R. 56–57, 97). Thus it would seem that the investigator had not yet entered the curtilage when he saw the still in operation, and certainly he had not when he saw that the truck tracks entered the barn door and heard men talking within.

Even assuming that the investigator had trespassed upon the curtilage before becoming aware that the still was being operated in the barn, it is settled that "The protection of the Fourth Amendment does not extend to the land surrounding the house" (*United States* v. *Feldman*, 104 F. (2d) 255, 256 (C. C. A. 3), certiorari denied, 308 U. S. 579) and that evidence is admissible although there was a trespass for the purpose of observation. *Hester* v. *United States*, 265 U. S. 57; *Koth* v. *United States*, 16 F. (2d) 59 (C. C. A. 9); *Schulte* v. *United States*, 11 F. (2d) 105 (C. C. A. 5); *United States* v. *Phillips*, 34 F. (2d) 495 (N. D. N. Y.). See *Raine* v. *United States*, 299 Fed. 407, certiorari denied, 266 U. S. 611.

Petitioners rely upon *Taylor* v. *United States*, 286 U. S. 1, in which this Court held that the presence of the odor of cooking mash alone does not warrant an exploratory search. However, in that case the Court declared (p. 6) that "Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime," and said that since, unlike the present case, no arrest was

made, it was unnecessary "to discuss the rule in respect of searches in connection with an arrest." See *Pong Ying* v. *United States,* 66 F. (2d) 67, 68 (C. C. A. 3). In the present case petitioners admit that the investigator could smell mash before entering the curtilage (Pet. 4; see R. 56); the disabled truck had been "reported to be hauling large quantities of sugar" (R. 53); it was found loaded with sugar; and the tracks of the reloaded truck demonstrated that it had turned in the pasture gate toward petitioners' farm (R. 54, 56). Accordingly, we submit, the officers at that point had reasonable grounds for believing that a felony was being committed on petitioners' premises and had the right to enter without a warrant for the purpose of making an arrest and, as an incident to such arrest, were justified in searching the premises for evidence of crime. *Agnello* v. *United States,* 269 U. S. 20, 30; *United States* v. *Feldman,* 104 F. (2d) 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; *Rocchia* v. *United States,* 78 F. (2d) 966, 969 (C. C. A. 9); *Wida* v. *United States,* 52 F. (2d) 424, 425 (C. C. A. 8); *McBride* v. *United States,* 284 Fed. 416 (C. C. A. 5), certiorari denied, 261 U. S. 614.[7]

[7] See also *Parks* v. *United States,* 76 F. (2d) 709, 710 (C. C. A. 5), certiorari denied, 296 U. S. 573; *Stark* v. *United States,* 44 F. (2d) 946, 948 (C. C. A. 8); *Schnorenberg* v. *United States,* 23 F. (2d) 38, 39 (C. C. A. 7); *Dulek* v. *United States,* 16 F. (2d) 275 (C. C. A. 6); *Koth* v. *United States,* 16 F. (2d) 59, 61 (C. C. A. 9); *United States* v. *White,* 29 F. (2d) 294, 295–296 (D. Neb.).

CONCLUSION

The decision below is correct, and no conflict of decisions or any question of general importance is presented. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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